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IN THE

# SUPREME COURT OF THE UNITED STATES

Petition For Writ of Certiorari Based On Jurisdiction Established By 28 U.S. Code Sec. 1257(3) From Decision of the Supreme Court of the State of Kansas, Case No. 44,625, First Published On July 17, 1967 and Finalized On August 31, 1967 By Denial of Motion For Rehearing

THE STATE OF KANSAS
Appellee
vs
ROBERT M. WALKER
Appellant

## BRIEF OF APPELLANT

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THE STATE OF KANSAS
Appellee
vs
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Appellant

## BRIEF OF APPELLANT

### NATURE OF THE CASE

In September, 1965, the Defendant was charged in the County Court of Wilson County, Fredonia, Kansas with violation of two (2) sections of the criminal provisions of the General Statutes of the State of Kansas which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such

person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this act.

Count II, Section 8-530: It is unlawful and punishable as provided in Sub-division (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

Subsequent to September, 1965, the County Attorney of Wilson County, Kansas, Mr. Donald C. Vosburgh, withdrew or dismissed the charges filed in the County Court of Wilson County, Kansas without a preliminary hearing being held and without the knowledge of Defendant, and filed charges against the Defendant in the District Court of Wilson County, Kansas.

In the District Court of Wilson County, Kansas, the Defendant, Robert M. Walker, the Appellant herein, was convicted of driving a vehicle on Highway K-96, Wilson County, in the State of Kansas, in violation of three (3) sections of K.S.A. 2-101, which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this act.

Count II, Section 8-531: Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Count III, Section 8-530: It is unlawful and punishable as provided in Subdivision (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

This case was tried in the District Court of Wilson County, Kansas on the 14th day of February, 1966.

Conviction of Defendant, Robert M. Walker, on the three (3) counts listed above was appealed to the Supreme Court of the State of Kansas.

Under the date of July 17, 1967, the Supreme Court of the State of Kansas reversed the conviction as to Count I and affirmed the conviction as to Counts II and III.

The Abstract of Apellant shows the evidence, instructions, objections and the rulings thereon pertinent to the questions now before this Court. All of these questions were presented to the trial court and the Supreme Court of the State of Kansas by a Motion for a New Trial, a Motion for Rehearing and arguments thereon, which motions were overruled, hence the appeal to this Court.

## QUESTIONS RAISED

1. DID THE TRIAL COURT ERR IN REFUSING TO DISCHARGE THE DEFENDANT FROM CHARGES BROUGHT AGAINST THE DEFENDANT UNDER COUNTS II, AND III AT THE CONCLUSION OF PRESENTATION OF EVIDENCE BY THE STATE?

2. DID TRIAL COURT ERR IN REFUSING TO LET THE DEFENDANT TESTIFY AS TO MATERIAL MAT-

TESTS, AND IN ALLOWING TROOPER WILTSE TO GIVE HIS OPINION, AND IN REFUSING TO ALLOW THE DEFENDANT TO GIVE HIS OPINION, EVEN THOUGH A PROPER FOUNDATION HAD BEEN LAID?

3. DID THE COURT ERR IN ADMITTING INTO EVIDENCE STATEMENTS MADE OR ALLEGED TO HAVE BEEN MADE BY DEFENDANT SUBSEQUENT TO ARREST WHEN DEFENDANT HAD REQUESTED AN ATTORNEY AND WHICH STATEMENTS WERE PREJUDICIAL AND INCRIMINATING?

4. DID THE COURT ERR IN ALLOWING TESTIMONY AS TO CONVERSATIONS AND ANSWERS RESULTING FROM CUSTODIAL INTERROGATION AND WITHOUT ADVISING DEFENDANT OF HIS CONSTITUTIONAL RIGHTS AND WHICH TESTIMONY WAS IN CONFLICT WITH THE TESTIMONY OF DEFENDANT?

5. DID THE COURT ERR IN NOT DISCHARGING THE DEFENDANT FROM COUNT II AND IN ALLOWING THIS COUNT TO BE CONSIDERED IN CONJUNCTION WITH COUNT III, REGARDING WHICH THE COURT ALLOWED INADMISSIBLE AND PREJUDICIAL EVIDENCE TO BE SUBMITTED FOR CONSIDERATION BY THE JURY?

6. DID THE COURT ERR IN ADMITTING EVIDENCE RESULTING AFTER THE DEFENDANT HAD REQUESTED THE PRESENCE OF AN INDEPENDENT WITNESS?

7. DID THE TRIAL COURT ERR IN OVERRULING DEFENDANT'S MOTION FOR A NEW TRIAL AND DID THE KANSAS SUPREME COURT ERR IN DENYING DEFENDANT'S MOTION FOR A REHEARING?

**STATEMENT OF FACTS**

In September, 1965, the Defendant, Robert M. Walker, was charged in the County Court of Wilson, County, Kansas with two (2) violations of the criminal statutes of the State of Kansas, namely: driving without having a valid driver's license and driving while under the influence of alcohol. These charges were dismissed or withdrawn without the knowledge of Defendant and without a hearing being held thereon. The charges were refiled and another charge added, that of reckless driving, in the District Court of Wilson County, Kansas.

The Defendant, Robert M. Walker, was accused in the District Court of driving a motor vehicle on September 4, 1965, on State Highway K-96, in Wilson County, Kansas, in volation of three (3) sections of the K.S.A. 2-101, which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this Act.

Count II, Section 8-531: Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Count III, Section 8-530: It is unlawful and punishable as provided in Subdivision (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

On September 4, 1965, the Defendant was driving east on Highway K-96, in Wilson County, and his car was stopped by Trooper Wiltse. Trooper Wiltse placed the Defendant under arrest and subsequent thereto, while at the scene, he had conversation with the Defendant. Trooper Wiltse searched the automobile; he slammed the Defendant against the front of the Highway Patrol car; he allowed the Defendant's wife to drive the Defendant's car into Fredonia; he drove Defendant into Fredonia in the Highway Patrol car; he interrogated the Defendant on the way into Fredonia without advising the Defendant of his constitutional rights; he took the Defendant inside the county jail at Fredonia. The Defendant on the way into the jail at Fredonia asked his wife to get an attorney but to stay in the vicinity as he was going to need a witness. Trooper Wiltse slammed the Defendant's wife against a brick parapet and threatened to arrest her if she didn't leave the vicinity. Trooper Wiltse slugged the Defendant while inside the jail, even though admittedly no threatening gestures or threats were made against him. Trooper Wiltse interrogated the Defendant inside the jail and asked him to take some coordination tests; the Defendant replied either "no comment" or "not applicable" to questions and reiterated several times that he was willing to take any sobriety

test if an independent witness was allowed to be present. Trooper Wiltse refused to allow the presence of an independent witness and the Defendant was then put in a jail cell.

## ARGUMENT AND AUTHORITIES

1. Did the Court err in refusing to discharge the Defendant from charges brought against the Defendant under Counts II and III at the conclusion of presentation of evidence by the State?

The basis of argument upon Count II, which charged the Defendant of reckless driving, is as follows:

The only evidence submitted in regard to reckless driving was that Trooper Wiltse testified that Defendant's left wheels crossed the center line on an incline; that the terrain was rolling and hilly; that the place where the Defendant's left wheels crossed the center line was half-way up the incline and that Defendant's left wheels crossed the center line four or five times within a mile. At *AM JUR* 420, Failure to Prove Essential Element, it is stated as follows:

> "Where the evidence fails to establish or shows the absence of an element necessary to justify a conviction, a motion to direct a verdict of acquittal on that ground must not be denied." *State v. Sullivan,* 199 P. 647.

In *Elliott v. Peters,* 163 Kan 636, in regard to reckless driving, under statute 8-531 it is stated:

> "To constitute wantonness, the acts complained of must show not simply lack of due care, but that the actor must be deemed to have realized the imminence of injury to others from his acts and to have refrained from taking steps to prevent the injury because indifferent to whether it occurred or not. If the actor has

reason to believe his act may injure another and does it being indifferent to whether it does or not, he is guilty of wanton conduct."

In *Adubbel vs. Brighton,* 141 Kan 617, the Court stated:

"We see from these authorities that this court has consistently held that for the conduct of the defendant to constitute a basis for a cause of action under the statute (G.S. 8-122b) it must show a reckless disregard of consequences as to evince a willingness that some harmful result will flow therefrom."

In *Anderson vs. Anderson,* 142 Kan 466, the Court stated:

"Our task is to ascertain what was in the mind of the driver. Wanton negligence requires as an element a mental attitude on the part of the Defendant of a will to injure, or such indifference to consequences, with realization that catastrophe is imminent as to amount to willingness to injure. This distinguishes such conduct from negligence, which is merely failure to exercise due care."

There was no accident involved in subject case, nor any evidence supporting any probability of an accident. The evidence does not show any imminence of injury to persons or property, nor any evidence to support the proposition that Defendant believed or had cause to believe his act might cause injury. There is no showing evidencing a reckless disregard of consequences.

In summation, giving all of the evidence the inferences in favor of the State, there is no evidence establishing the elements of the crime of reckless driving which would justify submission of the case to jury or a conviction by the jury after its submission.

Therefore, the demurrer to the evidence should have been sustained and the Defendant discharged and it was error for the Court to fail to discharge the Defendant, unless there was evidence supporting a wilful disregard of consequences other than the facts pertaining to driving.

With further regard to Count II in which the defendant was charged with driving "in such a manner as to indicate a wilful and wanton disregard for the safety of persons or property" in violation of K.S.A. 8-531, the only evidence of the manner of driving itself was that several times in going up a hill the vehicle of the defendant crossed the center line of the highway, on one occasion in a no-passing zone. The terrain was hilly, the speed limit in that area is 45 M.P.H. The defendant was within the speed limit.

It is the position that this, without more, does not constitute reckless driving, and in and of itself does not come within the statutory definition of indicating a wilful or wanton disregard for the safety of either persons or property.

Granting, as is argued by the State, that there need be no accident or injury to constitute reckless driving, still it must be agreed that reckless is a relative matter. Therefore, it would seem reasonable to require that there be a showing that the manner of driving was such that there was a clear danger of losing control of the vehicle, or that in complete control, which is a presumption, that there was in fact, danger to someone or something. It is submitted that the left hand wheels crossing to the left of the center line, even on the upgrade of a hill, and where the highway

is marked, shows neither. In this connection it should be remembered that the cars behind the vehicle were in no position to pass the defendant, both because of the speed limit and because of the hill and no-passing zone, and that there were no automobiles approaching from the opposite direction.

This is, of course, a violation of K.S.A. 8-537, but this violation, without more, is not recklessness. Analogous to this are the situations in which it has been claimed that the violation of a 'Rule of the Road' constitutes actionable negligence. This Court has held that this does not necessarily follow. In *Gardner v. Leighton* 144 K. 335, 58 P. 2d 1111, Justice Dawson wrote at page 338: "Defendants emphasize the fact that plaintiff's automobile was traveling on the south side of the road. True, but the used portion of the road was only about 12 feet wide in that vicinity. Moreover, when a motorist, so far as he can see, has the entire road to himself, he may travel on any portion of it, in the middle or on either side." The above decision was rendered in 1936, and the following year the Legislature enacted what is now K.S.A. 8-537, limiting driving to the right side of the highway, excepting under certain conditions and for certain purposes. Subsequently, the case law indicates that if such driving on the left side of the highway is the proximate cause of an accident, then it does constitute actionable negligence. However, in *Beecher v. Stepanian* 170 K. 201, 224 P. 2d 1017, at page 205 it is said "We recognize that not every violation of a statute convicts the actor of actionable negligence."

Thus we see that a violation of K.S.A. 8-537 cannot constitute a violation of 8-531 K.S.A. unless other elements are present. In this case the State took the position and this Court evidently subscribed to the position that the additional element was the fact that the defendant-appellant was under the influence of intoxicating liquor. This is indicated by the Court's statement on page 5 of its original opinion to the effect that:

> "Moreover, Wiltse's testimony that the defendant's automobile crossed the center line four or five times and went up a hill in a "no passing" zone on the wrong side of the highway for about 75 yards where the terrain was hilly and the traffic was heavy, and the defendant was under the influence of intoxicating liquor *(State v. Sullivan,* supra; *State v. Sisneros,* 42 N.M. 500, 82 P. 2d 274; 7 Am Jur. 2d, Automobiles and Highway Traffic, Section 264, p. 816), tended to disclose the defendant's conduct was such as to evince disregard or indifference to consequences, and was sufficient for the jury to reasonably draw an inference of guilt."

The key then must be that the Appellant was under the influence of intoxicating liquor. So it is inescapable that if the trial court erred in regard to evidence supporting the charge of being under the influence of alcohol, then the conviction of reckless driving should also be reversed.

2. Did the Court err by refusing to allow the Defendant to testify as to material matters and in allowing the prosecution to give opinion evidence while refusing to allow the defendant to do so even though a proper foundation had been laid?

The basis of argument on this point is that Defendant was asked on direct examination what happened and in describing what happened he stated that Trooper Wiltse told Defendant he would remain confined in jail until Monday morning and chortled with glee. At this point the Court admonished the Defendant in severe tones and directed the Defendant to answer only questions asked, and directed that Defendant's answer be stricken from the record and the jury was admonished to disregard Defendant's answer. Also, the Court refused to allow the Defendant to testify as to apparent misconceptions about an accident when in truth and in fact there had been no accident. Also, the Court erred in admitting opinion evidence by Trooper Wiltse, even though Trooper Wiltse suppressed evidence by refusing to allow the presence of an independent witness concerning Defendant's intoxication.

3. Did the Court err in admitting into evidence statements made or alleged to have been made by Defendant subsequent to arrest when Defendant had requested an attorney and which statements were prejudical and incriminating.

*In Escobido vs. State of Illinois,* 378 U.S. 490, 491, 84 S. Court 1765, decided on June 22, 1964, The Supreme Court of the United States held:

> "that where the investigation is no longer a general inquiry into unsolved crime but has begun to focus upon a particular suspect, the suspect has been taken into police custody, the police carry out process of interrogations that lends itself to incriminating statements, suspect has requested and been denied oppor-

tunity to consult with his lawyer, and police have not warned him of his absolute constitutional right to remain silent, the accused has been denied assistance of counsel in violation of the sixth amendment as made obligatory upon the state by the Fourteenth Amendment, and no statement elicited by police during interrogation may be used against him at the criminal trial."

The statements complained of are those resulting from testimony of Trooper Wiltse who testified as follows:

1. That after he had stopped Defendant's car the Defendant asked in very belligerent tones "What do you want?"
2. That Defendant asked Trooper Wiltse whether he had a search warrant when he went to search the car.
3. That on the way into Fredonia he asked Defendant several times what his name was and that Defendant replied "well, just say it's John Doe."
4. That on the way into Fredonia he asked the Defendant to take a blood alcohol test, and the Defendant refused to take the test.
5. That he advised the Defendant he was going to ask him some questions and that they would be used in court against the defendant.
6. That while in the jail he again asked the Defendant his name and received the reply "John Doe."
7. That after he forcibly sat the Defendant down the Defendant replied his name was Robert M. Walker.
8. That Defendant refused to answer any other questions he asked.
9. That while in the jail he again asked the Defen-

dant to take a blood alcohol test, and the Defendant refused again to take a blood test.

10. On cross-examination he volunteered the information that he asked Defendant on the way in to the county jail to take a blood test, and he further testified the Defendant refused to take a blood test.
11. On cross-examination he stated he asked the Defendant a second time to take a blood test and the Defendant refused.
12. That at the County Jail he asked the Defendant if he was operating the vehicle, where the Defendant was going, and whether Defendant had been drinking and that Defendant refused to answer these questions.
13. That at the jail he asked the Defendant what the Defendant had been drinking, what time did Defendant start drinking, when did the Defendant stop drinking and where was the Defendant drinking, and in response to these questions the Defendant replied "not applicable."

Other testimony as to conversations and interrogations was given by Sheriff Hubert Harris. He testified that Trooper Wiltse advised Defendant he was going to ask Defendant some questions which would be used against him, that Defendant refused to answer the questions and that Defendant was uncooperative.

Trooper Wiltse, testifying for the prosecution stated he had not advised the Defendant of his rights, nor was there any showing Defendant had been advised of his constitutional rights, and that Defendant had requested an attorney.

The interrogation of Defendant by Trooper Wiltse was never a general inquiry, and admission of the alleged statements made by Defendant as set forth above constitutes reversible error in accordance with principles and standards established by *Escobido vs. State of Illinois.*

4. Did the Court err in allowing the prosecution to present testimony regarding conversations and answers resulting from custodial interrogation and without advising Defendant of his constitutional rights, and which testimony was in conflict with and denied by testimony of Defendant.

The conversations and answers complained of are the same as those set forth in Paragraph 3 next above.

In regard to the case of *Miranda vs. Arizona,* 384 U.S. 436, decided by the Supreme Court of the United States, it is set forth at 10 A.L.R. 3d 974 as follows:

Evidence § — Statements made at custodial interrogation—admissibility:

1. The prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of the Defendant unless it demonstrates the use of procedural safeguards effective to secure the privileges against self-incrimination; "custodial interrogation" is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way.

Criminal Law § 111; Witnesses § 83.5 — rights of accused — warning by police.

2. As a constitutional prerequisite to *any questioning,*

an individual held for interrogation by a law enforcement officer must be warned in clear and unequivocable terms, that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Criminal Law § 111 — Police interrogation — Right to counsel.

4. If an individual held for interrogation by a law enforcement officer indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no interrogation.

Criminal Law § 111 — Right to counsel — Necessity of warning accused.

30. The absolute requirement of informing a person held for interrogation by a law enforcement officer of his right to consult with a lawyer and the right to have the lawyer with him during interrogation cannot be met by any amount of circumstantial evidence that he may have been aware of this right.

Criminal Law § 1; Witnesses 83.5 — Time when privilege against self-incrimination attaches.

46. The American adversary system of criminal proceedings distinguishes itself at the outset from the inquisitorial system recognized in some countries, commences when an individual is subject to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way; at this point the safe-

guards erected about the privilege against self-incrimination come into play.

Witnesses § 83.5 — Self incrimination — police interrogation.

5. If an individual held for interrogation by police indicates in any manner at any time, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.

It is recognized that in *Johnson vs. State of N.J.*, 86 S. Court, 1772, 1778, 384 U.S. 727, the general principle is set forth that the standards and principles established by *Miranda vs. Arizona* would not apply to cases tried before the decision date. However, this principle was made subject to certain reservations. It was stated in that opinion at page 1778 as follows:

> "In each instance we concluded that retroactive application was justified because the rule affected 'the very integrity of the fact finding process' and averted 'the clear danger of convicting the innocent' *Linkletter vs. Walker*, 381 U.S. 639, and *Tehan vs. United States*, et al Shott, 382 U. S. at 46 — — — — Accordingly as Linkletter and Tehan suggest, we must determine retroactivity in each case by looking to the peculiar traits of the specific rule in question."

The Court did not preclude past defendants as it stated at Page 1780 in regard to "new standards governing in-custody interrogation past defendants may still avail themselves of the voluntariness test."

In other words the court enunciated the principle that retro-

activity probably would not be applied when there was no question as to the truth or falsity of the state's evidence, but would be applied when the truth was a matter at issue.

In addition to the conflict in testimony at the trial, the Defendant stated at the conclusion of the trial to the trial court that Trooper Wiltse, testifying for the prosecution, had committed perjury in numerous instances and that Defendant was willing without reservation to take a polygraph (lie detector) test and for Trooper Wiltse to be given a polygraph test as to their testimony and that the results thereof be admitted into evidence and that if these tests were made, Defendant would waive all rights to appeal. The trial court refused to order these tests, which could have been used only against the Defendant.

The Defendant did not know until the time of the trial of the case what Trooper Wiltse would testify to, as no preliminary hearing was held.

An Affidavit of Perjury was filed with the State of Kansas and another has been filed with the Clerk of the District Court, Wilson County, Kansas, which states as follows:

**AFFIDAVIT OF PERJURY**

STATE OF KANSAS }
SEDGWICK COUNTY } ss:

ROBERT M. WALKER, Defendant in the above captioned matter, being first duly sworn, deposes and states:

That on February 14th and 15th, 1966, Trooper

Walter Wiltse of the Kansas Highway Patrol, appearing as a witness for the plaintiff in the captioned matter testified falsely and feloniously and particularly as follows:

1. That on September 4, 1965, he saw vehicle driven by defendant cross the center line several times, and on one particular occasion the vehicle crossed the center line on an incline or a hill. (Page 6 of Transcript).

2. That when he put the red light on, the woman in the car dumped the contents of a glass out of the window. (Page 7 of Transcript).

3. That when the defendant got out of his vehicle he stated in a very belligerent tone "What do you want?" (Page 7 of Transcript).

4. That defendant in response to a question asked on the way in to Fredonia, Kansas, refused to take an alcoholic chemical test. (Page 10 of Transcript.)

5. That defendant again refused to take a chemical test in response to request made in the presence of Sheriff Harris. (Page 10 of Transcript).

6. That vehicle driven by the defendant was weaving on the road. (Page 16 of Transcript).

7. That defendant drove up the hill on the wrong side of the road. (Page 17 of Transcript).

8. That he saw defendant drive over onto the left side of the road on numerous occasions, probably four or five times. (Page 17 of Transcript).

9. That defendant was driving on both sides of the road. (Page 24 of Transcript.)

10. That defendant did not ask him what was the matter and that defendant asked what the Trooper wanted. (Page 28 of Transcript).

11. That defendant was weaving on the road, crossing the center line numerous times, and that when defendant got out of the car he had a belligerent attitude. (Page 31 of Transcript).

12. That defendant indicated a belligerent attitude by his first words uttered, which were "What do you want?" (Page 36 of Transcript).

13. That he did not slam defendant against the front of the Highway Patrol vehicle. (Page 36 of Transcript).

14. That Mrs. Walker did not tell him defendant's name. (Page 38 of Transcript).

15. That defendant, in response to a request to take a blood test, stated: "No, I won't take a blood test." (Page 39 of Transcript).

16. That defendant did not, at the time of the foregoing request, make any reference to a doctor. (Page 39 of Transcript).

17. That he asked the defendant a second time to take a blood test in the County Jail. (Page 40 of Transcript).

18. That defendant refused again to take a blood test. (Page 40 of Transcript).

19. That defendant positively did not advise the Trooper he, the defendant, would take a blood test if defendant could have his own physician present. (Page 40 of Transcript).

20. That he told Mrs. Walker he was going to arrest her for interfering with a police officer. (Page 47 of Transcript).

21. That he smelled the glass he saw Mrs. Walker dump the contents from, and it had an alcoholic odor. (Page 99 of Transcript).

In regard to the foregoing, the truth of the matter is as follows:

1. That defendant's car did not cross the center line several times and defendant's car did not cross the center line on an incline of a hill.

2. That Mrs. Walker did not dump the contents of a glass out of the window.

3. That defendant did not state to Trooper Wiltse in a belligerent tone "What do you want" and that defendant did inquire "What is the matter, Officer, was I speeding?"

4. That on the way in to Fredonia, defendant did not refuse to take a blood alcohol test, but defendant did advise that he would be glad to take a test if his doctor was present. That Trooper Wiltse asked defendant the name and address of his doctor and defendant replied Dr. C. T. Hagan, Wichita, Kansas. That Trooper Wiltse stated he was not going to wait for any damn doctor to come from Wichita.

5. That defendant did not refuse a second time to take a B.A.T. in the presence of Sheriff Harris.

6. That defendant's car was not weaving on the road.

7. That defendant did not drive his car up a hill on the wrong side of the road.

8. That defendant did not drive over onto the left-hand side of the road several times, and did not so drive on four or five occasions.

9. That defendant was not driving on both sides of the road.

10. That defendant did ask Trooper Wiltse what was the matter and did not state "What do you want?"

11. That defendant was not weaving on the road and crossing the center line numerous times and defendant did not have a belligerent attitude when defendant got out of his car.

12. That defendant did not indicate a belligerent attitude by his first words and his first words were not "What do you want?"

13. That Trooper Wiltse did slam defendant up against the front of the Highway Patrol car.

14. That Mrs. Walker did tell Trooper Wiltse defendant's name.

15. That defendant did not state "No, I won't take a blood test."

16. That at the time of the request in No. 15, defendant did make reference to a doctor in that he stated he would be glad to take a test if his doctor was present, and that in response to request from Trooper Wiltse, defendant stated his doctor was Dr. C. T. Hagan.

17. That Trooper Wiltse did not ask defendant a

second time to take a blood alcohol test in the County Jail. That there was not even a second request to take a test.

18. That defendant did not refuse for the second time to take a blood alcohol test.

19. That defendant did advise Trooper Wiltse he would take a blood test if defendant's physician was present.

20. That Trooper Wiltse did not tell Mrs. Walker he was going to arrest her for interfering with a police officer.

21. That Trooper Wiltse did not smell a glass he saw Mrs. Walker dump the contents from, as she did not dump a glass and he did not smell alcohol as no alcoholic beverage had been drunk from any glass in the car.

Further, affiant states that the above acts of perjury were knowingly made by Trooper Wiltse and resulted in defendant's conviction of driving while under the influence of intoxicating liquor and reckless driving.

Further, affiant, knowing full well his constitutional rights, stipulates and agrees to take a lie detector (polygraph) test as to the truth or falsity of the foregoing and stipulates that the foregoing tests may be introduced as evidence in any court of law, whether heretofore tried or any subsequent charges, as valid and admissible evidence.

Also, affiant knowing full well his legal rights, stipulates and agrees to the State of Kansas giving a lie detector (polygraph) test to Trooper Walter Wiltse as to the truth or falsity of allegations set forth herein, and stipulates that the results of said test may be introduced as valid evidence

in any court of law in proceedings, whether heretofore tried or instituted subsequent hereto.

ROBERT M. WALKER
ATTORNEY AT LAW

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 20th day of November, 1967.

HELEN PUFFER
Notary Public

My Commission Expires: April 17, 1971.

**CERTIFICATE OF MAILING**

I hereby certify that a copy of the above and foregoing Affidavit of Perjury was mailed to Mr. Robert C. Londerholm, Attorney General of the State of Kansas, State Office Building, Topeka, Kansas and a copy to Mr. Donald C. Vosburgh, County Attorney, Wilson County, Fredonia, Kansas, on this *20th* day of November, 1967.

Robert M. Walker

The State still refuses to give polygraph tests, a recognized investigative technique, to either the Defendant and/or Trooper Wiltse.

In view of the conflict in testimony and the questionability as to the truth or falsity of the state's case, it is the position of the Defendant that the principles enumerated in Miranda apply to subject case.

It is evident from the abstract of Defendant that the Court erred in all of the precepts set forth above in the

case of Miranda v. Arizona, and as such constitutes reversible error.

5. Did the Court err in allowing Count II to be considered in conjunction with Count III, regarding which the court allowed inadmissible and prejudicial evidence to be submitted for consideration by the jury?

The basis for argument on this point is that the inadmissible and prejudicial evidence set forth in #4 above was without doubt considered by the jury as passing upon Defendant's guilt or innocence on Count II, and was clearly prejudicial to the rights of Defendant.

6. Did the Court err in admitting evidence resulting after Defendant had requested the presence of an independent witness?

The basis for argument on this point is that Trooper Wiltse suppressed any and all evidence which might be favorable to the Defendant by refusing to allow an independent witness to be present. Inasmuch as whether Defendant was under the influence at a point in time, the refusal by Trooper Wiltse to allow an independent witness was a disallowance of one's right to prove their innocence, and subjected the Defendant to police conclusions and opinions.

In summation it is the defendant's position that all opinion evidence should not have been admitted when the Defendant was denied the right to establish his innocence by independent and unbiased witnesses.

7. Did the Court err in overruling Defendant's motion for a new trial?

This question raises no new issues which have not been covered in the foregoing discussion. It is Defendant's clear and unequivocable belief that Defendant should have been discharged on all counts for the reasons set forth heretofore, prior to the motion for a new trial, and for these reasons a motion for a new trial should have been granted.

The Defendant requests that this Court sustain Defendant's motion to discharge as to Counts II and III, either individually or completely, or that this Court reverse the decisions of the trial court which were affirmed by the Supreme Court of The State of Kansas.

Respectfully Submitted,

Robert M. Walker
5426 E. Harry
Wichita, Kansas
and
John Spriggs
614 Indiana
Washington, D.C.
Attorneys for Appellant

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No. 875

IN THE

# SUPREME COURT OF THE UNITED STATES

Petition For Writ of Certiorari Based On Jurisdiction Established By 28 U.S. Code Sec. 1257(3) From Decision of the Supreme Court of the State of Kansas, Case No. 44,625, First Published On July 17, 1967 and Finalized On August 31, 1967 By Denial of Motion For Rehearing

THE STATE OF KANSAS,
APPELLEE

vs.

ROBERT M. WALKER,
APPELLANT

## ABSTRACT OF APPELLANT

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# No. _____

IN THE

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THE STATE OF KANSAS,
APPELLEE

vs.

ROBERT M. WALKER,
APPELLANT

## ABSTRACT OF APPELLANT

### INFORMATION

In September, 1965, the Defendant was charged in the County Court of Wilson County, Fredonia, Kansas with violation of two (2) sections of the criminal provisions of the General Statutes of the State of Kansas which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this act.

Count II, Section 8-530: It is unlawful and punishable as provided in Sub-division (b) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

Subsequent to September, 1965, the County Attorney of Wilson County, Kansas, Mr. Donald C. Vosburgh, withdrew or dismissed the charges filed in the County Court of Wilson County, Kansas without a preliminary hearing being held and without the knowledge of Defendant, and filed charges against the Defendant in the District Court of Wilson County, Kansas.

In the District Court of Wilson County, Kansas, the Defendant, Robert M. Walker, the Appellant herein, was convicted of driving a vehicle on Highway K-96, Wilson County, in the State of Kansas, in violation of three (3) sections of K. & A. 2-101, which provide as follows:

Count I, Section 8-235: No person, except those hereinafter expressly exempted, shall drive or operate any motor vehicle upon a highway in this State unless such person has a valid license as an operator, a special chauffeur, or a chauffeur under the provisions of this act.

Count II, Section 8-531: Any person who drives any vehicle in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Count III, Section 8-530: It is unlawful and punishable as provided in Subdivision (b) of this section for any

person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State.

This case was tried in the District Court of Wilson County, Kansas on the 14th day of February, 1966.

Conviction of Defendant, Robert M. Walker, on the three (3) counts listed above was appealed to the Supreme Court of the State of Kansas.

Under date of July 17, 1967, the Supreme Court of the State of Kansas reversed the conviction as to Count I and affirmed the conviction as to Counts II and III.

**EVIDENCE**

Walter Wiltse, a Kansas Highway Patrol Officer, testified as follows:

That on September 4, 1965, he proceeded east on K-39 east of the intersection of K-96 and K-39 and observed a green vehicle; that he observed the vehicle cross the center line several times (T-6); that on one particular occasion the vehicle crossed the center line on an incline or a hill (T-6); that the terrain was pretty hilly (T-6); that the vehicle was occupied by a man and woman; that the man was driving, (T-6); that he stopped the vehicle and that the driver of the vehicle got out of his vehicle and asked "What do you want" in a very belligerent tone, (T-7); that he advised the driver he was under the influence of alcohol, (T-7); that he asked to see the driver's license of the driver and that the driver told him the license had been left at Fall River, (T-8); that he went

around to the driver's side of the vehicle and stuck his head in to start to search the vehicle for an open container when Mr. Walker grabbed him by the shoulder and inquired whether he had a search warrant; that he then forcibly placed Mr. Walker under arrest, (T-8); that Mrs. Walker was allowed to proceed into Fredonia in Defendant's car; that he took Mr. Walker in with him, (T-8); that on the way in he asked Mr. Walker several times what his name was and Mr. Walker replied: "Well, just say it's John Doe" (T-8); that upon arriving at the County Jail Mr. Walker advised his wife to get him an attorney, (T-8); that he put Mr. Walker inside the Jail; that he advised Mr. Walker he was going to ask him some questions and that they would be used against him in Court, (T-9); that he again asked the Defendant what his name was and received the reply "John Doe" (T-9); that Sheriff Harris came out of his residence at this time and that he advised the Sheriff to keep Mrs. Walker away from the door so he could question the Defendant (T-9); that the Defendant got up two or three times and ran to the door; that he grabbed the Defendant and sat him down (T-9); that the Defendant's shirt was torn; that the Defendant gave his name, Robert M. Walker, and age (T-9); that the Defendant refused to answer any other questions he asked (T-9); that at the County Jail he asked for the second time if the Defendant would take a B.A.T. (Blood Alcohol Test) (T-9); that the Defendant refused to submit to a blood alcohol test (T-10); that he had also previously asked the Defendant on the way in to the Jail to take a blood alcohol test and

the Defendant also refused at that time to take the test. (T-10).

On cross-examination, Trooper Wiltse testified that the Defendant evidenced a belligerent attitude by uttering the words "What do you want" (T-32); that the Defendant was slammed up against the front of the Highway Patrol car (T-37); that he twisted the Defendant's arm up behind his back at the time he placed Defendant under arrest on the highway (T-37); that on the way to Jail he asked the Defendant if he would take a blood test (T-39); that Mr. Walker stated "No, I won't take a blood test" (T-39); that the Defendant refused a second time to take a blood test at the County Jail (T-40); that he was positive the Defendant did not state he would take a blood test if the Defendant's physician was present (T-40); that he asked additional questions of the Defendant when he was in the County Jail (T-40); that the Defendant refused to answer questions as to whether the Defendant was operating the vehicle, where he was going, and whether he had been drinking (T-41); that the Defendant responded "not applicable" to questions as to what he had been drinking, when he started drinking, when he stopped drinking, and where he was drinking (T41 & 42); that anyone who exercises their privilege not to answer questions is being uncooperative (T-42); that Defendant agreed to take any reaction tests, such as walking a line, if an independent witness was present (T-44); that he did not get an independent witness because he was not required to (T-45); that the Defendant did not make any physical threats or

moves toward the trooper and that the Defendant was not advised of his rights (T-49).

On direct examination SHERIFF HUBERT HARRIS, Wilson County, Kansas, stated that Trooper Wiltse advised Defendant he was going to ask him some questions which would be used against the Defendant (T-55); that Mr. Walker didn't answer any of the questions while the Sheriff was present (T-55); and that Mr. Walker was very uncooperative (T-55).

On cross-examination he stated that his opinion of intoxication was based on the uncooperativeness of the Defendant (T-59); and that Defendant refused to answer questions (T-60).

After Sheriff Harris completed his testimony, Attorney Russell Shultz moved for the Court to discharge the Defendant from the charges brought against the Defendant, namely: Count I, which charged a violation of Sec. 8-235; Count II, which charged a violation of Sec. 8-531, and Count III, which charged a violation of Sec. 8-530, K.S.A.

The Court overruled Defendant's motion as made by Attorney Shultz, on all three counts.

The Defendant, Robert M. Walker, then took the witness stand and was asked to state what happened. He stated that as he and Trooper Wiltse were proceeding up the sidewalk to the Jail, his wife, Geraldine, asked him what she should do; that he told her to get an attorney (T-74); that for the time being he wanted her to stay around the

premises as he was going to need a witness; that Trooper Wiltse told her to get out of there and grabbed her and flung her violently up against a brick parapet (T-74 & 75); that Trooper Wiltse took the Defendant inside the Jail (T-75); that Trooper Wiltse started asking questions after the parties were inside the Jail (T-75); that Trooper Wiltse slugged the Defendant when Defendant called out to his wife to remain in the vicinity as a witness (T-75); that Defendant was not threatening Trooper Wiltse at any time (T-75); that, after the slugging, Trooper Wiltse continued to ask questions of the Defendant (T-76); that, on several occasions, he told Trooper Wiltse he would take any sobriety test so long as an independent witness was present (T-76); that Trooper Wiltse refused to allow an independent witness to be present (T-77); and that Trooper Wiltse stated that Defendant was going to be in Jail until Monday morning and Trooper Wiltse chortled with glee. (At this point the Court admonished the Defendant in severe tones and manner of admonition to just answer questions, though this was part of Defendant's answer to questions asked, and had the Defendant's answer stricken from the record, and the jury was admonished to ignore and disregard it.) (T-77). That Trooper Wiltse, on the way into Fredonia, asked Defendant to take an alcohometer or blood alcohol test and in response thereto Defendant told Trooper Wiltse he would be happy to take any chemical test, but wanted a physician present (T-73) and that Trooper Wiltse did not ask a second time for the Defendant to take a blood alcohol chemical test at the county jail (T-78).

On cross-examination the Defendant was asked if he had a driver's license and Attorney Shultz objected to the question as being improper. (T-78). The Court overruled the objection and directed the Defendant to answer the question. (T-78).

Mrs. Geraldine Walker testified for the Defendant and in essence confirmed all testimony of the Defendant except that she did state Defendant tried to have a blood alcohol test taken by a doctor recommended by Attorney Steven A. Rogers, but a test could not be taken as no vial was available.

Trooper Wiltse testified again.

Attorney Shultz objected to instruction regarding Count I, violation of Sec. 8-235.

The Court overruled Defendant's objection to instruction in Count I.

**INSTRUCTIONS**
**No. 1**

The Information filed by the county attorney in behalf of plaintiff, The State of Kansas, charged the defendant, Robert M. Walker, with three separate criminal offenses. In all of them it is claimed that on or about September 4, 1965, on Highway K-96 in Wilson County, Kansas, the defendant was driving a certain motor vehicle, a 1959 Mercury bearing 1965 Kansas License No. SG-122568.

Count 1 charges that the defendant was driving said motor vehicle without first obtaining a valid operator's or chauffeur's license.

Count 2 charges that the defendant drove said motor vehicle in such a manner as to constitute what is known as reckless driving, which will be defined for you later.

Count 3 charges that defendant was driving said motor vehicle while under the influence of intoxicating liquor.

To all three charges the defendant has entered his plea of not guilty, and it is the question of his guilt or innocence that you are to determine by your verdict.

You can see that three separate charges are being tried together. You will consider them separately as if each one were being tried by itself, and you will return separate verdicts.

**No. 2**

The statutes of this State provide that no person, with some exceptions which do not apply here, shall drive any motor vehicle upon a highway in this State unless such person has a valid license as an operator or a chauffeur. Any person who violates such provision shall be guilty of a misdemeanor.

You cannot find the defendant guilty under Count 1 of the Information unless you find from the evidence beyond a reasonable doubt that the defendant did drive a motor vehicle upon a highway at the time and place mentioned and that he did not then have a valid operator's or chauffeur's license.

The statute further provides that a defendant cannot be found guilty if, at the trial or before, he produces a li-

cense which was valid at the time of the arrest.

**No. 3**

Concerning Count 2 the applicable statute provides that any person who drives any vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.

The term "wilful" is easily understood. It means purposely and intentionally, not accidentally.

"Wanton" conduct is something less than wilful although to be wanton the conduct must be such as to show a disregard of or indifference to consequences even though no harm was actually intended.

You can see that either wilful or wanton conduct will support the charge. You are instructed, however, that you cannot find the defendant guilty under Count 2 unless you find from the evidence beyond a reasonable doubt that he did drive a vehicle at the time and place mentioned in wilful or wanton disregard for the safety of persons or property.

**No. 4**

Concerning Count 3, the applicable statute provides that it is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this State. In order to find the defendant guilty of this charge you must be persuaded by the evidence beyond a reasonable doubt that the defendant did drive a vehicle at the time and place mentioned and that he was at that time under the influence of intoxicating liquor, as that expression is defined later in these instructions.

**No. 5**

The burden of proof is upon the State of Kansas to prove the defendant's guilt beyond a reasonable doubt, and this burden does not shift to the defendant at any stage of the trial. The defendant is presumed to be innocent of the charge against him and innocent of each and every essential ingredient of the charge, and this presumption of innocence abides with him throughout the trial and until such time as in your deliberations you are convinced by the evidence that his guilt has been established beyond a reasonable doubt. Until and unless you are so convinced the defendant is entitled to the benefit of this presumption of innocence and you must acquit him.

**No. 6**

Beyond a reasonable doubt does not mean that you must be convinced beyond any possible doubt, for there is some doubt connected with all human affairs. Beyond a reasonable doubt means that after weighing the evidence you must feel to a moral certainty that the defendant is guilty of the charge. As the term implies the doubt must be based upon reason, not imagination or emotion. After considering all of the evidence if you are not convinced beyond a reasonable doubt of the guilt of the defendant then you must acquit him.

**No. 7**

You are instructed that the phrase "under the influence of intoxicating liquor" does not mean that the defendant must have been drunk as that term is commonly used. It means that the liquor consumed must have impaired his

ability to operate his automobile to the degree that he was not able to operate it with safety to himself and to the public. A person who has taken a drink of liquor may not be under its influence. It must be shown that there was an impairment of the defendant's driving ability resulting from the liquor consumed.

As used in these instructions the terms "intoxicating liquor" and "alcoholic liquor" have the same meaning.

**No. 8**

The defendant has the right to testify in his own behalf as he has done in this case. His credibility as a witness and the weight to be given to his testimony are matters exclusively for you to determine, and you are to apply the same standards and rules that are given to you in other instructions for appraising the testimony of witnesses generally.

**No. 9**

It is the duty of the jury to decide the question of the guilt or innocence of the defendant and you are not concerned with the penalty in case of conviction. Guilt or innocence does not depend on the penalties fixed by law for an offense, but upon the evidence, and in arriving at your verdict you should lay aside any and all considerations of bias, prejudice, or sympathy, either for or against the defendant, and endeavor to reach a verdict based wholly upon the evidence and the instructions of the Court.

**No. 10**

Each verdict must be the result of twelve minds reaching the same conculsion. Every juror has the obligation to

confer with his fellow jurors and to attempt to reconcile differences in their views; however, each juror is required to exercise his own independent judgment and must be convinced in his own mind of the proper verdict to be reached in this case. Until all twelve of you so agree a verdict cannot be returned. All of the Court's instructions are directed to all three of the offenses charged insofar as they are applicable, and taking each charge separately you must all agree on a verdict of guilty or not guilty as to such charge.

**No. 11**

You are the exclusive judges of all the facts and circumstances in the case, the weight of the evidence, and the credibility of the witnesses. In determining what weight is to be given to the testimony of the different witnesses, you may take into consideration their relation, if any, to any of the parties interested in the result of the trial, the interest, or lack of interest, of any witnesses in the result of the trial, their temper, feeling and bias, if any has been shown, and their demeanor while testifying; and you will give such credit to the testimony of each witness as, under all the evidence, facts and circumstances of the case, it seems to be entitled to receive. If you believe, from all the evidence before you, that any witness has wilfully or knowingly testified falsely with reference to any material matter in controversy, then you are at liberty to disregard his entire testimony, but you are not obliged to do so. You may disregard a portion of his testimony and give to every other portion of the testimony of any witness greater weight and credit than

you may give to some other part of his or her testimony. You have the right to weigh every portion of the testimony of every witness and give to each portion of the testimony just such consideration as it is entitled to receive considering all the evidence, facts and circumstances in the case.

**No. 12**

Candidly consider the evidence, free from any bias, prejudice, fear, or favor, and arrive at your verdict from all the evidence submitted to you, and from the law as the Court has given it to you in these instructions.

Elect one of your number foreman. When you have agreed upon your verdict on a particular count have the foreman sign the appropriate form, guilty or not guilty as the case may be. After this has been done on all three counts advise the bailiff that you have reached your verdict and he will see that you are returned into Court.

/s/ George W. Donaldson
Judge

**VERDICT**

On the 12th day of March, 1966, the Defendant, Robert M. Walker, was found guilty and adjudged to pay a fine in the sum of Three Hundred Dollars ($300.00), and was sentenced to the County Jail for ninety (90) days, on each of three counts, the sentences to run concurrently and to pay the costs of the prosecution.

**MOTION FOR NEW TRIAL**

COMES NOW the defendant, Robert M. Walker, and moves the Court for an order granting him a new trial for the following reasons:

1. For the reason that the Court admitted improper testimony.
2. Because of the misconduct of the jury, preventing fair trial and due consideration of the case.
3. For the reason that the verdict was decided by means other than fair expression on the part of the jurors.
4. The Court misdirected the jury in material matters of law.
5. For the reason that the Court made erroneous rulings with regard to testimony in the case.
6. For the reason that the verdict is contrary to the law and evidence.

SHULTZ & KIRBY
/s/ Russell Shultz
Russell Shultz, Attorney for Defendant.

**CERTIFICATE OF MAILING**

I hereby certify that a copy of the above and foregoing Motion was mailed to Mr. Donald C. Vosburgh, County Attorney, this 16th day of February, 1966.

/s/ Russell Shultz

Which Motion was on the 12th day of March, 1966, overruled.

**NOTICE OF APPEAL**

TO: Donald C. Vosburgh, Attorney for the Plaintiff.

Take notice that the defendant in the above entitled action intends to, has and does appeal to the Supreme Court of the State of Kansas from the findings and judgment rendered and made in the above entitled action in favor of the plaintiff on the 12th day of March, 1966.

Dated this 16th day of March, 1966.

SHULTZ & KIRBY

/s/ Russell Shultz

Attorney for Defendant.

**ACKNOWLEDGMENT OF SERVICE**

I hereby acknowledge receipt of a copy of the Notice of Appeal filed in the above case on this 16th day of March, 1966.

/s/ Donald C. Vosburgh

**VERDICT OF THE SUPREME COURT OF THE STATE OF KANSAS**

The judgment of the District Court of Wilson County, Kansas was reversed as to Count I and affirmed as to Counts II and III in all respects.

SHULTZ & KIRBY
Attorneys at Law
331 South Hydraulic
Wichita, Kansas 67211
Telephone: AM 7-5309

**IN THE SUPREME COURT OF THE STATE OF KANSAS**

THE STATE OF KANSAS,

Appellee,

vs.

ROBERT M. WALKER,

Appellant.

**MOTION FOR REHEARING**

Case No. 44,625

COMES NOW the Appellant and moves this Court for rehearing on Counts II and III of the judgment appealed from, which are those parts only which were affirmed by this Court, for the following reasons:

The Appellant herein is a member of the Bar of this State. At the time the Abstract and Brief in this appeal were prepared, Appellant chose to prepare them for himself because of financial reverses recently suffered. Counsel of record now feels that the points of the appeal were not sufficiently clear to advise this Court of the real basis therefor.

With regard to Count II in which the defendant was charged with driving "in such a manner as to indicate a wilful and wanton disregard for the safety of persons or property" in violation of K.S.A. 8-531, the only evidence of the manner of driving itself was that several times in going up a hill the vehicle of the defendant crossed the center line of the highway, on one occasion in a no-passing zone. The terrain was hilly, the speed limit in that area is 45 M.P.H. The defendant was within the speed limit.

It is the position that this, without more, does not constitute reckless driving, and in and of itself does not

come within the statutory definition of indicating a wilful or wanton disregard for the safety of either persons or property.

Granting, as is argued by the State and as stated by this Court, that there need be no accident or injury to constitute reckless driving, still it must be agreed that reckless is a relative matter. Therefore, it would seem reasonable to require that there be a showing that the manner of driving was such that there was a clear danger of losing control of the vehicle, or that in complete control, which is a presumption, that there was in fact, danger to someone or something. It is submitted that the left hand wheels crossing to the left of the center line, even on the upgrade of a hill, and where the highway is marked, shows neither. In this connection it should be remembered that the cars behind the vehicle were in no position to pass the defendant, both because of the speed limit and because of the hill and no-passing zone, and that there were no automobiles approaching from the opposite direction.

This is, of course, a violation of K.S.A. 8-537, but this violation, without more, is not recklessness. Analogous to this are the situations in which it has been claimed that the violation of a 'Rule of the Road' constitutes actionable negligence. This Court has held that this does not necessarily follow. In *Gardner v. Leighton* 144 K. 335, 58 P. 2d 1111, Justice Dawson wrote at page 338: "Defendants emphasize the fact that plaintiff's automobile was traveling on the south side of the road. True, but the used portion of the road was only about 12 feet wide in that vicinity.

Moreover, when a motorist, so far as he can see, has the entire road to himself, he may travel on any portion of it, in the middle or on either side." The above decision was rendered in 1936, and the following year the Legislature enacted what is now K.S.A. 8-537, limiting driving to the right side of the highway, excepting under certain conditions and for certain purposes. Subsequently, the case law indicates that if such driving on the left side of the highway is the proximate cause of an accident, then it does constitute actionable negligence. However, in *Beecher v. Stepanian* 170 K. 201, 224 P. 2d 1017, at page 205 it is said "We recognize that not every violation of a statute convicts the actor of actionable negligence".

Thus we see that a violation of K.S.A. 8-537 cannot constitute a violation of 8-531 K.S.A. unless other elements are present. In this case the State took the position and this Court evidently subscribed to the position that the additional element was the fact that the defendant-appellant was under the influence of intoxicating liquor. This is indicated by the Court's statement on page 5 of its original opinion to the effect that:

> "Moveover, Wiltse's testimony that the defendant's automobile crossed the center line four or five times and went up a hill in a "no passing" zone on the wrong side of the highway for about 75 yards where the terrain was hilly and the traffic was heavy, and the defendant was under the influence of intoxicating liquor *(State v. Sullivan,* supra; *State v. Sisneros,* 42 N.M. 500, 82 P. 2d 274; 7 Am Jur. 2d, Automobiles and Highway Traffic, Section 264, p. 816), tended

> to disclose the defendant's conduct was such as to evince disregard or indifference to consequences, and was sufficient for the jury to reasonably draw an inference of guilt."

The key then must be that the Appellant was under the influence of intoxicating liquor. But, how was this shown by the State? Of course, first by showing that he crossed the center line of the highway. The statement of the State and of this Court as set out in the above quotation is considerably broader than the evidence disclosed. The evidence was to the effect that the Appellant crossed the center line with his left wheels five or six times, but that he straddled the center line and never got all four wheels to the left of the line. (T-18).

The sum of the evidence regarding intoxication was the testimony of Trooper Wiltse, stated as follows: Cross-examination T-31.

A: I felt he was under the influence.

Q: I'll ask you, what was — were the factors that brought you to that conclusion at that time?

A: Well, by his weaving on the road, crossing the center line numerous times, the fact that when he got out of the car he was unsteady on his feet, he was of a belligerent attitude and he refused to show his driver's license.

In addition to the above, the Trooper testified that the Appellant had an odor of alcohol on his breath. To enumerate them the State's evidence was that:

1. Appellant was weaving on the highway so that his wheels crossed the center line on five or six occasions.

2. Appellant swayed when he walked from his car.

3. Appellant had an odor of alcohol on his breath.

4. Appellant was belligerent and uncooperative.

Discussing these in order, #1 has been pretty well discussed above.

The evidence regarding #2 was by the testimony of the Trooper at page 29 of the transcript that Walker was unsteady on his feet, but he stated clearly that he was not staggering. Then, on pages 43 and 44 the Trooper stated that he did not give the Appellant any sobriety test because he could tell he was under the influence because he was unsteady on his feet. The Trooper admitted that there are many things which can cause unsteadiness other than being under the influence, such as physical impairments, but that he did not inquire about this possibility.

Concerning factor #3, it is well known that a mere odor of alcohol, which incidentally is invariably described by an arresting officer as STRONG, does not necessarily make one under the influence.

If we assume, then, that the conclusion of the Trooper concerning factor #4 was correct, it is the position of Appellant the evidence in its entirety was not sufficient basis to justify the ultimate conclusion of the officer that the Appellant was, or had been, driving under the influence of intoxicating liquor.

There was no other testimony concerning the appearance of the Appellant, such as eyes, complexion, speech, clothing, tidiness, general appearance or general coordination other than the walk, which could even remotely be indicative of intoxication. It must, therefore, be presumed that these factors were all favorable to the Appellant. This is particularly true when it is remembered that the Appellant offered to take any test submitted if he could first talk with a lawyer, or in the alternative, if the Trooper would obtain one independent person to observe the tests as a witness. This was refused by the officer simply because he was not required to do so. (T-45).

At the time the Trooper stated his conclusion that the Appellant was under the influence, objection was made on the grounds that there had been shown no qualifications on the part of the officer and also that there was no proper foundation or basis for the conclusion shown, which objection was overruled. (T-10-11). This was error on the part of the trial court. Even with this conclusion, however, a fair and proper prima facie case was not established and the Appellant should have been discharged.

At the close of the State's evidence, the Appellant moved that the State be required to elect, and that the Appellant be discharged upon or from both counts, which motion was overruled.

We, therefore, have the result that a person is convicted of a traffic offense which is commonly known as reckless driving, and of another offense of driving while under the influence of intoxicating liquor, upon precisely

the same facts. The Appellant contended at trial and still contends that if all the above discussed factors are considered together this case is controlled by *State v. McLaughlin*, 121 K 693 and that the Appellant's conduct — "constituted a single criminal delinquency and not two distinct crimes carrying separate and successive punishments—". If on the other hand, the above factors can be separated, then the Appellant should be discharged from both.

There is one other subject, however, that in the opinion of counsel should be re-examined. The State presented evidence of the Appellant's refusal to take a blood alcohol test, and the refusal to answer other questions to support the position that the Appellant was under the influence, by showing that he was belligerent and uncooperative. This was improper, as a violation of the Appellant's constitutional rights, and prejudiced the Appellant in the eyes of the jury, which it was carefully calculated to do, and constitutes plain error.

Trooper Wiltse testified that he determined the Appellant to be belligerent from the fact that the Appellant's first words on his vehicle being stopped were "What do you want" in a belligerent tone. On cross-examination, he was asked if he determined this belligerence from the tone of voice and he indicated that he had. He then stated that he asked for identification but that the Appellant replied that he didn't have his driver's license and didn't have to show him any identification. In the fiasco which occurred at the point of arrest, the Trooper put Appellant in his car and on the way to town asked him again his name and his

age and whether or not he would take a blood alcohol test. This was all refused. The Appellant indicated that he intended to remain silent and requested that before he answer any questions he wished to consult with counsel. He tried to get his wife to go someplace and obtain a lawyer after their arrival in town. This disturbed the Trooper because he did not want Mr. and Mrs. Walker talking together. He admitted that Mr. Walker told him he would take sobriety tests if he could consult with a lawyer or if an independent witness were obtained. This was refused by the officer. After arrival at the jail, notwithstanding the indication of the Appellant that he wished to remain silent, the Trooper advised him again that he was going to ask him some questions that would be used against him in court and did ask him questions and reiterated the request for a blood alcohol test. The officer testified that this was the uncooperative and belligerent attitude demonstrated by the Appellant, and that this was one of the factors that he considered in determining that in his opinion, the Appellant was under the influence of intoxicating liquor.

The point which Appellant attempted to make in the original brief included nothing new from the *Miranda v. Arizona,* 384 U.S. 436 16 Law Edition 2d, 694, and 86 Supreme Court 1602, excepting that the rule as there laid down, states that once an accused advises an interrogating officer that he wishes to consult with counsel and remain silent, that interrogation must cease. It is true, as this Court stated in its original opinion, that under the holding of *Johnson v. N. J.,* 384 U.S. 719, 16 Law Edition 2d 882,

86 Supreme Court 1772, it was held that the Miranda case applied only prospectively from the date of the decision, holding at the same time that *Escobedo v. Illinois* 378 U.S. 478 12th Law Edition 2d 977, 84 Supreme Court 1758, was to be applied prospectively only after June, 1964. However, the real proposition here presented is whether or not it is proper for the officer to continue to question an accused after he has indicated his intent to remain silent, so that the refusal to answer questions can be pointed up to the jury, to the prejudice of the accused.

It would appear that the rule in Escobedo, that is, the right to counsel, arose in this case immediately upon the stopping of Appellant's car on the highway by the Trooper. When this right was insisted upon by the Appellant, it was improper for the officer to continue to ask questions directly for the purpose of pointing up to the jury Appellant's insistence upon a constitutional right of silence and of counsel as being belligerent and uncooperative. It is true that the Appellant did not make answers which, for their substance, could be used against him, but his refusal to answer was used against him.

It has long been the rule that comments upon a defendant's refusal to testify or to answer questions made to a jury by either the Judge or the prosecuting attorney is plain error. Why, then, is it not plain error for an arresting officer to testify with regard to the insistence upon these constitutional rights, together with his conclusion that because of them, a defendant was belligerent and uncooperative, and to conclude that this was an indication of

intoxication, which was a material element in this instant case. Subject to the same line of reasoning, is the refusal to take a blood alcohol test. Section 8-1001 K.S.A. which provides a presumption of consent to submit to a chemical test for the purpose of determining the alcoholic content of one's blood, clearly provides that "If the person so arrested refuses a request to submit to a test it shall not be given" . . . it would seem to be true, therefore, as the Court says, that the request of the officer to the defendant to take a test does not violate his constitutional right, but to use the refusal against him before a jury, again to indicate belligerence and a lack of cooperation with the intent to show that this is indicative of intoxication, which was a material element in this case, was improper and prejudicial.

It is the Appellant's position that his right to remain silent, his right to consult with counsel, and his right given by statute to refuse a blood alcohol test, were all matters of clear right which were not subject to being commented upon by the court or by counsel or by the prosecuting witness. Again, it should be remembered that the prosecuting witness agreed that the Appellant offered to submit to tests of any matter if the officer would either allow him to consult with counsel or obtain an independent witness, which was tantamount to offering to demonstrate his innocence, and that this offer was refused by the Trooper.

This Court recently made a determination in *State v. Dearman* 198 K. 44, in which it was stated: "It is reversible error to permit a jury to draw an inference adverse to one accused of crime from his reliance upon his constitu-

tional right to silence and to the advice of counsel. The right to silence on arrest is akin to the right to decline to take the witness stand in one's own defense." The Court followed the holding in *Fagundes v. U.S.*, 340 Fed. 2d 673 and held that this case was persuasive and in that regard stated: "We think the foregoing decision is persuasive and hold that evidence disclosing that one charged with crime has asserted his constitutional right to counsel, and his constitutional right to remain silent, cannot be used against him substantively as an admission of guilt." This holding did not differentiate between court, counsel or witness.

It is submitted that to elicit testimony by letting the comments come from the officer's mouth rather than direct from counsel is still within the rule and that that holding controls the situation in this case.

If this rule is applied, we find then, that one of the factors which the officer considered as bearing upon intoxication, must fall by the wayside, leaving as the sole basis the weaving of the automobile, the swaying walk and an odor of alcohol to constitute reckless driving and driving under the influence. For these reasons, therefore, this Appellant respectfully requests this Court to grant a rehearing in this matter.

In making a decision upon this question, Appellant would further urge upon the Court that the Court examine the original transcript of the trial. While it hardly need be stated to this Court the case of this kind involving a member of this Bar, who is in good standing, is of prime im-

portance, and for this reason Appellant would request that the Court allow further oral argument herein.

In the alternative, the Appellant hereby requests that if this motion is summarily overruled, that this Court withhold the issuance of its mandate and make an order staying the execution of judgment and sentence herein under provisions and conditions authorized by Title 28, Section 2101(F) U.S.C.A. so that this Appellant may make application to the Supreme Court of the United States for a writ of certiorari.

Respectfully Submitted,
/s/ Russell Shultz
Russell Shultz, Attorney for Appellant.

Which motion was denied on August 31, 1967.

**AFFIDAVIT OF PERJURY**

Under date of November 20, 1967, the Defendant filed with the Clerk of the District Court, Wilson County, Kansas, an Affidavit of Perjury, which states as follows:

IN THE DISTRICT COURT OF
WILSON COUNTY, KANSAS

STATE OF KANSAS,

Plaintiff,

vs.

ROBERT M. WALKER,

Defendant.

No. 18809

## AFFIDAVIT OF PERJURY

STATE OF KANSAS
SEDGWICK COUNTY
ss:

ROBERT M. WALKER, Defendant in the above captioned matter, being first duly sworn, deposes and states:

That on February 14th and 15th, 1966, Trooper Walter Wiltse of the Kansas Highway Patrol, appearing as a witness for the plaintiff in the captioned matter testified falsely and feloniously and particularly as follows:

1. That on September 4, 1965, he saw vehicle driven by defendant cross the center line several times, and on one particular occasion the vehicle crossed the center line on an incline or a hill. (Page 6 of Transcript).

2. That when he put the red light on the woman in the car dumped the contents of a glass out of the window. (Page 7 of Transcript).

3. That when the defendant got out of his vehicle he stated in a very belligerent tone "What do you want?" (Page 7 of Transcript).

4. That defendant in response to a question asked on the way in to Fredonia, Kansas, refused to take an alcoholic chemical test. (Page 10 of Transcript).

5. That defendant again refused to take a chemical test in response to request made in the presence of Sheriff Harris. (Page 10 of Transcript).

6. That vehicle driven by the defendant was weaving

on the road. (Page 16 of Transcript).

7. That defendant drove up the hill on the wrong side of the road. (Page 17 of Transcript).

8. That he saw defendant drive over onto the left side of the road on numerous occasions, probably four or five times. (Page 17 of Transcript).

9. That defendant was driving on both sides of the road. (Page 24 of Transcript).

10. That defendant did not ask him what was the matter and that defendant asked what the Trooper wanted. (Page 28 of Transcript).

11. That defendant was weaving on the road, crossing the center line numerous times, and that when defendant got out of the car he had a belligerent attitude. (Page 31 of Transcript).

12. That defendant indicated a belligerent attitude by his first words uttered, which were "What do you want?" (Page 36 of Transcript).

13. That he did not slam defendant against the front of the Highway Patrol vehicle. (Page 36 of Transcript).

14. That Mrs. Walker did not tell him defendant's name. (Page 38 of Transcript).

15. That defendant, in response to a request to take a blood test, stated: "No, I won't take a blood test." (Page 39 of Transcript).

16. That defendant did not, at the time of the fore-

going request, make any reference to a doctor. (Page 39 of Transcript).

17. That he asked the defendant a second time to take a blood test in the County Jail. (Page 40 of Transcript).

18. That defendant refused again to take a blood test. (Page 40 of Transcript).

19. That defendant positively did not advise the Trooper he, the defendant, would take a blood test if defendant could have his own physician present. (Page 40 of Transcript).

20. That he told Mrs. Walker he was going to arrest her for interfering with a police officer. (Page 47 of Transcript).

21. That he smelled the glass he saw Mrs. Walker dump the contents from, and it had an alcoholic odor. (Page 99 of Transcript).

In regard to the foregoing, the truth of the matter is as follows:

1. That defendant's car did not cross the center line several times and defendant's car did not cross the center line on an incline of a hill.

2. That Mrs. Walker did not dump the contents of a glass out of the window.

3. That defendant did not state to Trooper Wiltse in a belligerent tone "What do you want" and that defendant did inquire "What is the matter, Officer, was I speeding?"

4. That on the way in to Fredonia, defendant did not refuse to take a blood alcohol test, but defendant did advise that he would be glad to take a test if his doctor was present. That Trooper Wiltse asked defendant the name and address of his doctor and defendant replied Dr. C. T. Hagan, Wichita, Kansas. That Trooper Wiltse stated he was not going to wait for any damn doctor to come from Wichita.

5. That defendant did not refuse a second time to take a B.A.T. in the presence of Sheriff Harris.

6. That defendant's car was not weaving on the road.

7. That defendant did not drive his car up a hill on the wrong side of the road.

8. That defendant did not drive over onto the left-hand side of the road several times, and did not so drive on four or five occasions.

9. That defendant was not driving on both sides of the road.

10. That defendant did ask Trooper Wiltse what was the matter and did not state "What do you want?"

11. That defendant was not weaving on the road and crossing the center line numerous times and defendant did not have a belligerent attitude when defendant got out of his car.

12. That defendant did not indicate a belligerent attitude by his first words and his first words were not "What do you want?"

13. That Trooper Wiltse did slam defendant up

against the front of the Highway Patrol car.

14. That Mrs. Walker did tell Trooper Wiltse defendant's name.

15. That defendant did not state "No, I won't take a blood test."

16. That at the time of the request in No. 15, defendant did make reference to a doctor in that he stated he would be glad to take a test if his doctor was present, and that in response to request from Trooper Wiltse, defendant stated his doctor was Dr. C. T. Hagan.

17. That Trooper Wiltse did not ask defendant a second time to take a blood alcohol test in the County Jail. That there was not even a second request to take a test.

18. That defendant did not refuse for the second time to take a blood alcohol test.

19. That defendant did advise Trooper Wiltse he would take a blood test if defendant's physician was present.

20. That Trooper Wiltse did not tell Mrs. Walker he was going to arrest her for interfering with a police officer.

21. That Trooper Wiltse did not smell a glass he saw Mrs. Walker dump the contents from, as she did not dump a glass and he did not smell alcohol as no alcoholic beverage had been drunk from any glass in the car.

Further, affiant states that the above acts of perjury were knowingly made by Trooper Wiltse and resulted in

defendant's conviction of driving while under the influence of intoxicating liquor and reckless driving.

Further, affiant, knowing full well his constitutional rights, stipulates and agrees to take a lie detector (polygraph) test as to the truth or falsity of the foregoing and stipulates that the foregoing tests may be introduced as evidence in any court of law, whether heretofore tried or any subsequent charges, as valid admissable evidence.

Also, affiant knowing full well his legal rights, stipulates and agrees to the State of Kansas giving a lie detector (polygraph) test to Trooper Walter Wiltse as to the truth or falsity of allegations set forth herein, and stipulates that the results of said test may be introduced as valid evidence in any court of law in proceedings, whether heretofore tried or instituted subsequent hereto.

ROBERT M. WALKER

ATTORNEY AT LAW

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 20th day of November, 1967.

Helen Puffer

Notary Public

My Commission Expires: April 17, 1971.

**CERTIFICATE OF MAILING**

I hereby certify that a copy of the above and foregoing Affidavit of Perjury was mailed to Mr. Robert C. Londerholm, Attorney General of the State of Kansas, State Office Building, Topeka, Kansas and a copy to Mr. Donald C. Vosburgh, County Attorney, Wilson County, Fredonia,

Kansas, on this *20th* day of November, 1967.

/s/ Robert M. Walker

Robert M. Walker

**NOTICE OF APPEAL**

TO: Mr. Robert C. Londerholm, Attorney General for the State of Kansas

Take notice that the Defendant in the matter of the State of Kansas vs. Robert M. Walker, Defendant, Case No. 18809, District Court of Wilson County, Kansas, has and does appeal to the Supreme Court of the United States from the findings and judgment rendered and made in the District Court of Wilson County, Kansas on March 12, 1966 and has and does appeal from affirmation of the same matter made by the Supreme Court of the State of Kansas as to Counts II and III on July 17, 1967 to the Supreme Court of the United States.

Dated this 20th day of November, 1967.

Robert M. Walker

Attorney for Defendant

**ACKNOWLEDGEMENT OF SERVICE**

I hereby acknowledge receipt of a copy of the Notice of Appeal filed in the above case on this 20th day of November, 1967.

Robert C. Londerholm

**NOTICE OF APPEAL**

TO: Mr. Donald C. Vosburgh, Attorney for the Plaintiff (Appellee), Fredonia, Kansas

Take notice that the Defendant in the matter of the State of Kansas vs. Robert M. Walker, Defendant, Case

No. 18809, District Court of Wilson County, Kansas, has and does appeal to the Supreme Court of the United States from the findings and judgment rendered and made in the District Court of Wilson County, Kansas on March 12, 1966 and has and does appeal from affirmations of the same matter made by the Supreme Court of the State of Kansas as to Counts II and III on July 17, 1967 to the Supreme Court of the United States.

Dated this 20th day of November, 1967.

Robert M. Walker
Attorney for Defendant

**ACKNOWLEDGEMENT OF SERVICE**

I hereby acknowledge receipt of a copy of the Notice of Appeal filed in the above case on this 20th day of November, 1967.

Donald C. Vosburgh

**SPECIFICATIONS OF ERROR**

1. That the Trial Court erred in refusing to discharge the Defendant from charges brought against the Defendant under Counts II, and III at the conclusion of presentation of evidence by the State.

2. That the Trial Court erred in refusing to let the Defendant testify as to material matters, while allowing Trooper Wiltse to give his opinion, and in refusing to allow the Defendant to do so even though a proper foundation was laid.

3. That the Court erred in admitting into evidence statements made or alleged to have been made by Defendant to police subsequent to arrest when Defendant had

requested an attorney, and which statements were prejudicial and incriminating.

4. That the Court erred in allowing testimony as to conversations and answers resulting from custodial interrogations, and without advising Defendant of his constitutional rights, and which testimony was in conflict with testimony of Defendant.

5. That the Court erred in not discharging the Defendant from Count II and in allowing this count to be considered in conjunction with Count III, regarding which the Court allowed inadmissable and prejudicial evidence to be submitted for consideration by the jury.

6. That the Court erred in admitting evidence resulting after Defendant had requested the presence of an independent witness.

7. That the trial court erred in overruling Defendant's motion for a new trial and the Kansas Supreme Court erred in not sustaining motion for a new hearing.

**CERTIFICATE**

The foregoing is a true and correct Abstract of the Record in the above entitled matter.

By Robert M. Walker, Attorney
for Appellant.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 875

THE STATE OF KANSAS,
*Respondent,*

vs.

ROBERT M. WALKER,
*Petitioner.*

## BRIEF OF RESPONDENT IN OPPOSITION

ROBERT C. LONDERHOLM
Attorney General of Kansas
J. RICHARD FOTH
Assistant Attorney General of Kansas
Topeka, Kansas
*Attorneys for Respondent*

JOHN K. SARGENT
Assistant Attorney General of Kansas
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R. L. Mastersons, Inc., 901 Cherry Street, Kansas City, Mo. 64106, HArrison 1-2000

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. .....

THE STATE OF KANSAS,
*Respondent,*

vs.

ROBERT M. WALKER,
*Petitioner.*

## BRIEF OF RESPONDENT IN OPPOSITION

### STATEMENT OF THE CASE

The petitioner seeks a writ of certiorari to the Supreme Court of Kansas to review the decision of that court affirming the decision of the District Court of Wilson County, Kansas, denying petitioner's motion for a new trial.

### OPINION BELOW

The opinion of the Supreme Court of Kansas is reported in *State* v. *Walker*, 199 Kan. 508, 430 P.2d 246 (1967).

## JURISDICTION

The petitioner seeks to have this Court accept jurisdiction under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

1. Whether the Supreme Court of Kansas was correct in refusing to apply retroactively the standards contained in the *Miranda* decision to the instant case.
2. Whether the state district court was correct in admitting into evidence statements made by petitioner subsequent to his arrest.
3. Whether there is a federal question involved in the petitioner's other contentions.

## STATUTES INVOLVED

K.S.A. 8-530 provides:

> "(a) It is unlawful and punishable as provided in subdivision (c) of this section for any person who is under the influence of intoxicating liquor to drive any vehicle within this state."

K.S.A. 8-531 provides:

> "(a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving."

## STATEMENT OF FACTS

On February 14, 1966, the case of *State* v. *Walker*, came on for trial in the District Court of Wilson County, Kansas. The petitioner, a licensed attorney, was charged with three counts of driving a motor vehicle upon a pub-

lic highway: (1) without first obtaining a valid operator's license, as required by K.S.A. 8-235; (2) in a reckless manner as defined by and in violation of K.S.A. 8-531; (3) while under the influence of intoxicating liquor, in violation of K.S.A. 8-530. Thereafter, on March 12, 1966, the petitioner was convicted by a jury on all three counts. The petitioner's motion for a new trial was overruled and on appeal, the Supreme Court of Kansas reversed the judgment of the district court with respect to Count One, and affirmed the petitioner's conviction on the charges contained in Counts Two and Three. *State* v. *Walker*, 199 Kan. 508, 430 P.2d 246 (1967). A motion for rehearing was considered and denied on August 31, 1967. Petitioner is now seeking review of this decision.

The facts giving rise to the arrest and conviction of the petitioner and the court testimony pertinent to the questions presented in the petition for certiorari are adequately stated in both *State* v. *Walker*, supra, and in the petitioner's "Abstract of Appellant."

## ARGUMENT

### 1. The Supreme Court of Kansas Was Correct in Refusing to Apply Retroactively the Standards Contained in the Miranda Decision to the Instant Case.

The petitioner, in relying upon the guidelines set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), contends that the district court erred in allowing the prosecution to present testimony regarding conversations and answers resulting from custodial interrogation without first advising petitioner of his constitutional rights. The petitioner would have this Court apply the guidelines contained in the *Miranda* decision retroactively. In support of his position the petitioner erroneously infers from the language contained in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966),

that *Miranda* would not be applied retroactively when there is no question as to the truth or falsity of the State's evidence, but will be so applied when the truth is a matter at issue.

*Johnson* v. *New Jersey* expressly states that because retroactive application of *Miranda* would seriously disrupt the administration of our criminal laws, *Miranda* should apply only to those cases in which the trial began after the date of the decision, but not to those cases still on direct appeal after that date. Since the trial in the instant case began February 14, 1966, four months after *Johnson* v. *New Jersey*, supra, was decided, *Miranda* should not be applied retroactively.

**2. The State District Court Was Correct in Admitting into Evidence Statements Made by Petitioner Subsequent to His Arrest.**

The petitioner claims that because he was not advised of his constitutional right to remain silent and because he was refused an opportunity to consult with an attorney, the trial court erred when it admitted into evidence certain statements made by him subsequent to his arrest, and cites and relies on *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

There nowhere appears in the petitioner's "Abstract of Appellant" any statement made by him to the interrogating officer that he desired an attorney. The most that can be said is that at his trial, he did testify that he told the police officer that he would take any chemical test provided that a physician was present. Even assuming that the petitioner did request an attorney and was refused, it cannot be said that he made any statements that could be construed as being self-incriminating. The petitioner is not a layman as was Escobedo, who was unschooled in the subtleties of the law, but rather he is a law

school graduate and a licensed and practicing attorney in the State of Kansas, and presumably well aware of his constitutional rights. Moreover, in *State* v. *Walker,* supra, the court, at page 250, stated:

> ". . ., the record discloses that the defendant was well aware of his rights as evidenced by his complete and continued refusal to answer any questions asked by the interrogating officer. The only answer he made to any question was to finally give his proper name. That, in itself, is no violation of any constitutional right."

The doctrine, as laid down in *Escobedo,* is not applicable here, as the petitioner is an attorney, well-versed in the science of law and further, the record does not disclose what self-incriminating statements if any, were made.

**3. No Federal Question Is Involved in Petitioner's Other Contentions.**

The petitioner invokes the jurisdiction of this Court under subsection (3) of 28 U.S.C. §1757, which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

As to his first, second, fifth and sixth contentions, the petitioner neither draws into question the validity of

the Kansas statutes, K.S.A. 8-531 and 8-530, on the ground that they are repugnant to the Constitution or laws of the United States, nor does he claim that the contentions involve a determination of any right, privilege or immunity under federal law infringed by the Kansas state court decree. The petitioner alleges only generally that his rights were violated, but does not state precisely what provisions of the Federal, as distinguished from the state, Constitution are relied upon.

The main thrust of the petitioner's argument goes to the sufficiency and legal admissibility of certain evidence alleged to be detrimental to his rights. In *State* v. *Walker*, supra, at page 249, the Supreme Court of Kansas stated that:

> "In determining whether there was sufficient evidence to sustain the verdict rendered, this court will consider only that evidence supporting or tending to support the findings made (Citations omitted), and will not review or weigh conflicting evidence (Citations omitted). In a criminal appeal, this court examines the evidence only to ascertain whether there is an entire absence of substantial evidence from which the jury might reasonably draw an inference of guilt (Citations omitted), and a verdict of guilty will not be disturbed if supported by substantial competent evidence."

In affirming the district court's judgment with respect to the petitioner's conviction on Counts Two and Three, the Kansas Supreme Court reviewed the evidence disclosed by the record and stated that the evidence was sufficient for the jury to reasonably draw an inference of the petitioner's guilt.

The Seventh Amendment to the United States Constitution provides:

> "fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

An exception to the above is where there is a question on the competency and legal effect of the evidence as bearing upon a question of Federal law, in which case this Court may review the facts. *Graham* v. *Gill*, 223 U.S. 643 (1912).

In the instant case, however, the petitioner does not allege that any facts that would tend to lead one to infer that there was present any violation of a federally guaranteed right.

The petitioner is a skilled legal practitioner, experienced in legal matters. Absent any showing by the petitioner as to what Federal rights guaranteed to him by the Constitution were violated, this Court should not disturb the judgment of the Supreme Court of Kansas, which is based on state law and which has not been shown to clash with the United States Constitution. See *Voeller* v. *Neilston Co.*, 311 U.S. 531 (1940), where the Court stated that those matters within the exclusive province of the state which do not involve Federal violations, are not properly before the Court and will not be considered.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT C. LONDERHOLM
Attorney General of Kansas
J. RICHARD FOTH
Assistant Attorney General of Kansas
*Attorneys for Respondent*

JOHN K. SARGENT
Assistant Attorney General of Kansas
*Of Counsel*